

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-publication of Notice Statement)

Add Section 105.5, and Amend Section 195,
Title 14, California Code of Regulations (CCR).
Re: Cooperation with State and Federal Fishery Observers

- I. Date of Initial Statement of Reasons: October 2, 2002

- ## II. Dates and Locations of Scheduled Hearings:

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| (a) | Notice Hearing: | Date: August 30, 2002
Location: Oakland, CA. |
| (b) | Adoption Hearing | Date: December 5, 2002
Location: Monterey, CA. |

- ### III. Description of Regulatory Action:

- (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

A recent federal interpretation that federal groundfish observer rules do not apply to State-managed fisheries (vessels that do not operate under federal groundfish permits), combined with resistance on the part of some fishermen to accommodate fishery observers aboard their vessels, threatens the ability of the State and federal fisheries managers to continue to collect this data as required. Consequently, the National Marine Fisheries Service requested in a letter dated August 14, 2002 that this issue be placed on the Commission's late August agenda to take action to require commercial fishing vessels permitted by the State to carry federal observers when fishing for federally managed species in State or federal waters.

The Commission took action at its regularly scheduled August 29-30, 2002 meeting to adopt emergency regulations to help ensure that fishery observers would be provided access and accommodation aboard commercial fishing vessels. The emergency regulation adopted by the Commission and approved by the Office of Administrative Law in September must be adopted on a permanent basis through the normal rulemaking process in order to assure that fishery data vital to management and rebuilding of important fisheries off California may continue to be collected after expiration of the current emergency regulations.

As background, approximately 80 species of groundfish (bottom fish), generally associated with sea-floor habitats, are managed under the federal Pacific Coast Groundfish Fishery Management Plan (Groundfish Plan). The Groundfish Plan was developed by the Pacific Fishery Management Council (Council), and is implemented through regulations adopted by the National Marine Fisheries Service (NMFS), as authorized pursuant to the Magnuson-Stevens Sustainable Fisheries Act (Magnuson-Stevens Act). Under the Sustainable Fisheries Act, when fish stocks have been declared overfished (have declined to less than 20 percent of their unfished biomass) they become subject to Council approved rebuilding plans that are designed to restore them to at least 40 percent of their unfished biomass within a specified time period.

In June 2002, the Council closed fisheries for rockfish and lingcod (and California scorpionfish and ocean whitefish that associate with rockfish and lingcod) in waters 20 fathoms (120 feet) or deeper south of 40 degrees, 10 minutes North Latitude (near Cape Mendocino, Humboldt County) to protect bocaccio rockfish. During September 2002 the Council set catch levels for 2003 groundfish fisheries, including those for overfished rockfish and lingcod, based on the fishery data collected during 2001 and 2002. Fishery species-composition and bycatch information is critical to understanding what quantity of the overfished stocks are being taken incidental to fisheries for other species. Similarly, during September 2003, the Council will be setting catch levels for 2004 based on information collected from the fishery conducted during 2002 and 2003.

The National Marine Fisheries Service has established an at-sea Comprehensive Observer Program to place trained staff aboard commercial fishing vessels to determine the identity and amount of bycatch in the fisheries. Regulations governing groundfish observers for the north Pacific groundfish fishery include provisions that are incorporated in the emergency regulations to ensure that observers are able to complete their data collection duties under reasonable and safe conditions free from harassment and interference (Section 679.7, Title 50, Code of Federal Regulations). As a part of the current program, each year boats that are to have observers aboard are randomly selected to ensure a random sample of boat catches are observed that can be used to reasonably estimate the level of take of overfished stocks in the fisheries. Some fishermen selected for the observer program to start in September of 2002 that fish for State-managed species off California have indicated an unwillingness to participate in the program and legal council for the NMFS and Council indicate that, while they can require vessels with federal limited entry permits to carry observers, they cannot require the same for vessels fishing for State managed species or federal species for which a federal permit is not required. Therefore, this regulatory action is to provide for observer coverage of

vessels permitted or licensed under Commission regulations during the balance of 2002 and beyond the period encompassed by the already adopted emergency regulations.

Information on type and amount of bycatch collected from the observer program involving State-managed species this during this and subsequent years will be critical to assess groundfish stocks and setting harvest levels for 2004 and beyond. Therefore, if this data series is interrupted, it could have serious consequences on stock assessment and rebuilding efforts in coming years.

The Commission adopted similar requirements for commercial passenger fishing vessels (CPFVs) during its consideration and adoption of interim nearshore fishery regulations in December of 2000 due to the reaction (reluctance) of some CPFV operators to the groundfish restrictions that were being placed on this fishery at that time to protect and rebuild rockfish and lingcod stocks. The increasing restrictions on sport and commercial groundfish fisheries has made collection of data more difficult, but are imperative to meet the mandates of State and federal fisheries policies and directives [Magnuson-Steven's Act and California's Marine Life Management Act (Chap. 1052, Stats 1998)].

Part of the proposed action is to repeal a current section which only applies to owners and operators of CPFV vessels and barges subject to Section 195 of Title 14, CCR and to apply the provision for cooperation with State and Federal Fishery observers to all vessel owners and operators that are permitted or licensed under Commission regulations, or are licensed under statutes that give the Commission regulatory authority. The proposed new regulation provides a procedure for the Department to request revocation of permits or licenses when it determines a vessel owner or operator is being uncooperative. It also exempts vessels from having to provide food or a subsistence allowance to fishery observers but does require the vessel to meet certain sampling and information needs of the fishery observers.

Therefore, in summary, regulatory action will help ensure that trained State and federal fisheries observers are provided continued access to commercial fishing vessels operating off California to collect essential fishery information on the level of bycatch (incidental catch) of overfished stocks of shelf rockfish and nearshore rockfishes. The proposed new regulation provides a procedure for the Department to request revocation of permits or licenses when it determines a vessel owner or operator is being uncooperative (refuses to allow observers aboard). It also exempts vessels from having to provide food or a subsistence allowance to fishery observers, but does require the vessel to meet certain sampling and operational needs of the fishery observers.

Costs to the Department:

Costs to the Department associated with adoption and implementation of the proposed regulations are primarily those related to coordination with the Comprehensive Federal Fisheries Observer Program that provides most of the professionally trained staff conducting at-sea monitoring and assessment of commercial fishing operations. Additional cost to the Department resulting from the regulation are expected to be minimal. Existing Marine Region staff are already involved with the Federal Comprehensive Observer Program and will continue to assist with its coordination.

- (b) Authority and Reference Sections from Fish and Game Code for Regulations:

Authority: Sections 240, 1006, 7071, 7652, 7923, 8405.3, 8425, 8587.1, and 8591, Fish and Game Code.

Reference: Sections 7055, 7056, 7058, 7071, 8587, and 8587.1, Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change:

None.

- (d) Identification of Reports or Documents Supporting Regulation Change:

- (e) Public Discussions of Proposed Regulations Prior to Notice Publication:

This issue was included as a discussion item on the Commission's August 30, 2002 regularly scheduled meeting agenda where the emergency regulations for requiring observer cooperation was adopted by the Commission. The minutes of that meeting are being summarized and responses to those public comments provided will be responded to in the Pre-adoption Statement of Reasons or the Final Adoption Statement of Reasons.

IV. Description of Reasonable Alternatives to Regulatory Action:

- (a) Alternatives to Regulation Change: Alternatives considered to the regulation change primarily involve efforts to encourage voluntary compliance with at-sea observer programs. This includes emphasizing the importance of the data collected in sustaining viable populations of

fish and the fisheries. However, with the increasing need to adopt management measures to sustain viable fisheries, there is increasing concern by some fishery participants that data collected on their vessels will be used to further curtail fishing, which has occurred in the case of overfished stocks. However, the immediate effects on the fishery of further constraints on fishing are overshadowed by the need to maintain renewable resources that will provide greater cumulative value to the fishery in the long term if maintained at sustainable levels through sound management based on accurate fisheries data collected according to scientific protocols.

- (b) No Change Alternative: This alternative does nothing to address the current need to maintain an appropriate level of at-sea collection of fishery data through full cooperation by fishery participants.
- (c) Consideration of Alternatives: In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

Generally, participants in the commercial sectors of the nearshore fishery are small business operators. The commercial fishery is conducted from a variety of small to large sized vessels that utilize a variety of fishing gear in coastal waters. The proposed regulations that have already been adopted on an emergency basis do not require the vessel operator to or owner to provide an observer with meals or a subsistence allowance on observed fishing tips, but must accommodate the observer with regard to reasonable eating and working

condition. These requirements are not expected to result in significant adverse economic impacts to affected businesses.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.
- (c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None
- (e) Nondiscretionary Costs/Savings to Local Agencies: None
- (f) Programs mandated on Local Agencies or School Districts: None
- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None
- (h) Effect on Housing Costs: None

Informative Digest (Plain English Overview)

Under existing law, State and federal regulations exist to manage groundfish species including rockfish and lingcod. These regulations include State and federal provisions for the placement of fishery observers aboard commercial fishing vessels. Also under existing regulations, lingcod and at least six species of rockfish (bocaccio, cowcod, canary, yelloweye, darkblotched, and widow rockfishes) have been declared overfished off California, and subject to rebuilding requirements as directed under the Magnuson-Stevens Sustainable Fisheries Act. Also under existing law, nearshore rockfish and associated species that are being subjected to increased fishing by commercial and sport fisheries, are directed to be managed on a sustainable basis, that include the setting of annual harvest limits. On August 30, 2002, the Fish and Game Commission (Commission) adopted emergency regulatory changes to ensure cooperation with at-sea fisheries observers that collect vital fisheries information from which to assess effects of the fishery on important fish stocks.

Annual assessments of the status of shelf and nearshore groundfish stocks depend on the collection of data, including information on fisheries bycatch and discards that is collected by fishery observers from vessels while at sea. Some owners and operators of fishing vessels that are fishing for State-managed species or for which a federal permit is not required are refusing to participate in ongoing observer programs that collect this vital information. To deal with this problem so that blocks of vital fishery data are not lost, and the integrity of dependent fisheries assessments is not compromised, regulatory action is proposed to require that owners and operators of commercial fishing vessels permitted under regulations of the Commission, and commercial passenger fishing vessels licensed pursuant to Fish and Game Code Section 7920, will, as a condition of permit or license issuance, cooperate with Department or Federal fishery observers, or observers collecting data for the Department, when asked to carry and accommodate an observer on fishing trips at no cost to the sponsoring agency. The Department may request revocation of fishing permits or licenses by the Commission for denials for observer access where the denials are deemed uncooperative in nature, after first allowing the owner or operator to meet with the Manager of the Marine Region or his representative, to provide an explanation of the denial. The regulations also include provisions for requiring a vessel owner or operator to provide explanation in writing within 15 days of a written request by the Department where an observer is denied access (coverage) on a trip. The proposed regulations provide that a Department or federal request to place an observer aboard shall not include a requirement that the vessel owner or operator provide an observer with meals or a subsistence allowance, but require that they shall accommodate the observer with regard to reasonable eating and working condition and access to pertinent fishing information and fishery data while aboard the vessel. Failure to provide such reasonable access may lead to revocation of vessel fishing permits or licenses issued under regulations of the Commission. The proposed

regulations make it unlawful to assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with an observer, or otherwise interfere with or bias sampling procedures, tamper with, destroy or discard an observer's collected samples, equipment, or gear, or require the observer to perform duties normally performed by crew members. These proposed regulations follow the recent adoption and approval of emergency regulations to make the regulations permanent and effective during 2003 and beyond.